

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION THREE**

**STRONG MEMORIAL HOSPITAL,
UNIVERSITY OF ROCHESTER**

Petitioner/Employer

and

Case 03-UC-141687

**1199 SEIU UNITED HEALTHCARE
WORKERS EAST**

Union

DECISION AND ORDER

The Employer is a health care institution that operates a hospital located at 601 Elmwood Avenue, Rochester, New York (Hospital) where it provides inpatient and outpatient medical and professional care services. The Employer's twenty-six departments provide a wide-range of medical services including ambulatory/outpatient care services. The ambulatory care services are provided onsite at the Hospital, and offsite at twenty-five locations geographically separate from the Hospital. The Union represents the service employees at the Employer's Hospital facility.¹ The Union has never represented employees at any of the Employer's offsite facilities,

¹ The Employer and Union have been parties to a series of collective-bargaining agreements, the most recent of which is effective from September 21, 2014 through September 16, 2017. Article 1 (Recognition) defines the unit inclusions and exclusions of the collective-bargaining agreement (the Unit) as follows [emphasis added]:

1. [A]ll regular full-time and regular part-time (employed to work regularly more than 1/5 of the regular full-time workweek for the job classification in the department) service Employees employed by the University of Rochester at Strong Memorial Hospital (including Medical Center Schools, Housekeeping) and **all present and future locations and facilities under the principal direction and control in Monroe County, N.Y.**, such as those whose duties are defined by the current classifications, including any working leaders in the classifications listed in Appendix A, excluding Employees listed in paragraph 2 below. The bargaining unit was clarified by the National Labor Relations Board on May 11, 1990 (Case No. 3-UC-309) to include Patient Care Technicians.

except for the Clinton Crossing facility which is relatively close to the Hospital and where employees occupy three bargaining unit positions.²

At issue here, is the central service technician (CST) job classification which was first established by the Employer in 2009 when it opened its offsite facility at the University of Rochester Medical Center Surgical Center at Sawgrass (Sawgrass).³ In August of 2013, the Employer acquired its newest offsite facility, Strong West Ambulatory Center located at 156 West Avenue, Brockport, New York (Strong West).⁴ Strong West is a multi-purpose ambulatory/outpatient center located in Monroe County approximately 20 miles west of the Hospital. Strong West opened and was certified as a clinic in August of 2013, and later certified in 2014 as an offsite emergency department to provide outpatient surgery. Three CSTs are employed at Strong West.⁵ The Union has never represented employees in the CST job classification.⁶

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2. Not represented by the Union, and hence not covered by this Agreement are confidential employees, administrators, professionals, supervisors, managerial employees, clerical employees (including Unit Clerks and Receptionist Clerks I and II not in Unit Management or in the Inpatient Division Assistants category above), registered nurses, licensed practical nurses, pharmacists, case workers, case aides, therapists, technicians, telephone operators, secretaries, security employees, maintenance employees, powerhouse employees, gift shop employees, all employees in other certified Labor Relations Board Bargaining Units, temporary employees, all University of Rochester students on the student payroll, all other students whose employment is related to a course of study requiring work training experience, and all part-time employees regularly working a total of 1/5 of the regular full-time workweek or less for the job classification in the department in which they work.

² There are three bargaining unit positions at the Employer's Clinton Crossing offsite location. The employees holding these positions were originally employed as bargaining unit employees at the Hospital and were permanently transferred to Clinton Crossing when the Orthotics and Prosthetic Division moved from the Hospital's main campus to the Clinton Crossing offsite facility.

³ The Sawgrass facility is located approximately 2 miles from the Hospital.

⁴ The Employer acquired Strong West in an asset purchase when Lakeside Hospital closed.

⁵ Strong West and Sawgrass are the only offsite ambulatory facilities that are staffed with CSTs. In addition, there are no CSTs employed at the Hospital where bargaining unit employees work.

⁶ Unit placement of the Sawgrass CSTs was the subject of a unit clarification petition filed in Case 03-UC-539, discussed in more detail below.

The Employer filed the instant petition to expressly exclude the Strong West CSTs from the bargaining unit.⁷ The Union contends that the Strong West CSTs are included in the bargaining unit because the collective-bargaining agreement, specifically the after-acquired facilities provision in the Recognition clause, states that the Unit includes “all present and future locations and facilities under the principal direction and control [of the Employer] in Monroe County.” The Union further contends that the matter should be deferred to the parties’ grievance-arbitration procedure to resolve the dispute because there is a timely filed grievance covering the issue and a demand for arbitration.⁸ The Employer asserts that it is the Board’s role, not an arbitrator’s, to resolve questions concerning representation, and it is improper for the Union to seek to accrete the Strong West CST position through the arbitral process. The Employer further argues that the CSTs unit inclusion is prohibited because the Strong West CSTs and the bargaining unit employees lack the requisite overwhelming community of interest needed to warrant their inclusion in an existing unit without affording them the opportunity to vote on whether they wish to be represented.

As discussed below, based on the record and relevant Board law, I find that the processing of the Employer’s petition is appropriate, because the determination of questions concerning representation, accretion, and unit placement are not matters for arbitration, but

⁷ The Employer’s petition seeks clarification to exclude individuals employed at Strong West which the Union is attempting to accrete via arbitration. At the hearing the Employer stipulated that the sole job classification in dispute at the hearing is whether or not the Strong West CST should be included in the parties’ existing collective-bargaining agreement. Accordingly, the findings herein are limited to the CSTs at Strong West.

⁸ The Union filed three class action grievances, listed below with corresponding dates and issues. On November 5, 2014, the Union demanded to arbitrate separately the second and third grievances dated August 29 and September 5, 2014, which both allege that the Employer violated the collective-bargaining agreement’s Recognition and Seniority clauses:

1. September 24, 2013 – Failing to post Strong West service jobs to the bargaining Unit or improperly subcontracting the work. (Pet. Ex. 2).
2. August 29, 2014 – Performance of Unit work (Strong West Emergency Department) by non-Unit employees at Strong West. (Joint Exh. 13).
3. September 5, 2014 – Performance of Unit work (Ambulatory Surgery) by non-Unit employees at Strong West. (Joint Exh. 15).

rather, are matters within the exclusive province of the Board to resolve. I also find that the Strong West CSTs are properly excluded from the Unit because they have historically been excluded and do not share such an overwhelming community-of-interest with unit employees to warrant their inclusion.

I. BOARD LAW

It is appropriate for the Board to process a unit clarification petition filed mid-term in the agreement when a party to that the collective-bargaining agreement seeks resolution of the dispute by the grievance-arbitration procedure which may result in an arbitral award inconsistent with Board law. Ziegler, Inc., 333 NLRB 949, 949 (2001), citing Williams Transportation Company, 233 NLRB 837 (1977); Tweedle Litho, Inc., 337 NLRB 686 (2002). Where a party utilizes a contractual means to resolve a unit placement dispute, the Board, will consider a unit clarification petition regardless of when in the bargaining cycle the petition is filed, the historical placement of the position or whether there have been recent, substantial changes to the position. Ziegler, Inc., supra, at 949, distinguishing Bethlehem Steel Corp., 329 NLRB 243 (1999). In doing so, the Board reasoned such matters are not appropriate for arbitration and emphasized its exclusive autonomy to determine “questions regarding representation, accretion and unit placement.” Ziegler, Inc., supra, at 949. See also, Marion Power Shovel Company, Inc., 230 NLRB 576, 577-578 (1977) (“[t]he determination of questions concerning representation, accretion, and appropriate unit do[es] not depend upon contract interpretation but involve[s] the application of statutory policy, standards, and criteria. These are matters for decision of the Board rather than an arbitrator”).

When a party seeks to absorb an unrepresented group of employees into an existing bargaining unit without an election by accretion or other demonstrated showing of majority

status, it must show that the added group of employees “have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted.” Frontier Telephone of Rochester, Inc., 344 NLRB 1270, 1271 (2005), quoting E.I. DuPont, 341 NLRB 607, 608 (2004). The Board is restrictive in its application of the accretion doctrine because it deprives the unrepresented group of employees the opportunity to demonstrate whether or not they desire to be represented by the existing collective-bargaining representative. Archer Daniels Midland Co., 333 NLRB 673, 675 (2001); Save-It Discount Foods, Inc., 263 NLRB 689, 693 (1982); Westwood Import Company, Inc., 251 NLRB 1213, 1220 (1980).

The Board imposes the same burden on a party seeking to accrete positions into an existing unit as it does on those that seek to overcome the single-facility presumption in an initial representation and applies many of the same community of interest factors, such as: integration of operations, centralization of management and administrative control, geographical proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, degree of separate daily supervision, and degree of employee interchange. Safety Carrier, 306 NLRB 960, 969 (1992); Peter Kiewit Sons’ Co., 231 NLRB 76 (1977); Edenwald Construction Co., 294 NLRB 297 (1989). The Board gives the most, and normally controlling, weight important, to the degree of employee interchange and common day-to-day supervision. Frontier Telephone of Rochester, Inc., 344 NLRB at 1271; Passavant Retirement & Health Center, 313 NLRB 1216, 1218 (1994); Heritage Park Health Care Center, *supra*.

II. APPLICATION OF BOARD LAW TO THIS CASE

The Employer timely filed this petition and it is appropriate for consideration in light of the pending grievance and demand for arbitration concerning the unit placement of the Strong West CSTs. Ziegler, Inc., supra, at 949. Absent resolution through Board proceedings, it is possible an arbitrator may resolve the unit placement of the Strong West CSTs in a manner inconsistent with Board law. Furthermore, it is the Board's exclusive jurisdiction to resolve questions concerning representation, accretion and other unit placement issues. Id.

I also note the Union and Employer were parties to a prior unit clarification petition which was filed by the Union, and dismissed by the Acting Regional Director in Strong Memorial Hospital, University of Rochester, Decision and Order dated August 27, 2010 (Case 03-UC-539). There, the Union sought the inclusion of CSTs employed at Sawgrass into the Unit. In dismissing the petition, the Acting Regional Director found that the after-acquired facilities language in the recognition clause was an insufficient basis upon which to add the Sawgrass CSTs to the Unit. The Acting Regional Director also found that the parties had a past practice of excluding employees at the offsite ambulatory facilities from the Unit. Finally, the Acting Regional Director utilized the traditional accretion analysis applied to employees at a geographically different location and determined that the Sawgrass CSTs lacked an overwhelming community of interest with unit employees to warrant their inclusion in the Unit. The Petitioner in that case, the Union in this one, did not file a request for review of the Acting Regional Director's Decision and Order dismissing the petition.

Consistent with the Region's ruling and findings in Case 03-UC-539, I find that the Strong West CSTs cannot be accreted to the Unit by virtue of the contractual language extending recognition to "all future locations and facilities under the principal direction and control in

Monroe County, N.Y.” Except for the three employees transferred from the Hospital campus to Clinton Crossing, referenced in the prior UC case and described above, no service employees working at the Employer’s twenty-four other offsite ambulatory care facilities are represented by the Union.⁹ Therefore, there is no basis to conclude that this position or any other classification at satellite facilities has been historically included.

As noted the parties historically have excluded offsite/ambulatory care facilities from the Unit and the record demonstrates and I find that the accretion of the Strong West CSTs to the Unit is inappropriate because they lack an overwhelming community-of-interest with other employees in the Unit. Frontier Telephone of Rochester, Inc., 344 NLRB at 1271; E.I. DuPont, 341 NLRB 607, 608 (2004).

In considering the community-of-interest factors, it is not unusual for some factors to be in favor of accretion and others against. Here, the only factor that weighs in favor of accreting the Strong West CSTs into the bargaining Unit is that the CSTs and the material processing specialists (MPS), a unit job located in the hospital have similar duties.

CSTs prepare, maintain and sterilize surgical instruments and equipment. They assist with the turnover of surgical cases, and stocking products needed for surgery, and prepare the operating rooms and other patient care areas for surgical procedures. They ensure that the surgical instruments are sterile, and open and present sterile equipment or instruments for use in the operating room.

⁹ In addition, the Acting Regional Director in Case 03-UC-539, in dismissing the petition to clarify the Unit to include the Sawgrass CSTs, relied on the majority test applied by the Board in Gitano Distribution Center, 308 NLRB 1172 (1992). The majority test is not applicable to the instant case because the Strong West CSTs were not transferred or relocated from or to the Unit. Here, all three Strong West CSTs were either employed by the Employer in a non-unit position or were new hires.

CSTs are trained in sterile techniques and use of the operating room tables, and machinery. CSTs hired after January 1, 2014, must be certified in central sterilization techniques. Two of the three Strong West CSTs are certified and the third CST is pursuing certification. CSTs are required to possess a high school diploma or GED, and one to three years of experience or the equivalent combination of education and experience.

Like the CSTs, the MPSs' decontaminate and sterilize surgical equipment and instruments. Also similar to the CSTs, as of January 1, 2014, MPSs' are required to obtain certification. Despite their similar skills and training however, the MPS employees and Strong West CSTs do not work together or substitute for each other. Furthermore, the fact that employees have interchangeable duties is not dispositive of unit placement issues in the absence of evidence of interchange. See Super Valu Stores, 283 NLRB 134, 136 (1987); Essex Wire Corporation, 130 NLRB 450, 453 (1961).

Weighing the remaining factors, and giving particular weight to employee interchange and day-to-day supervision, I find the operations at Strong West have little to no connection with the Hospital and that the CSTs at Strong West have a distinct and separate community-of-interest from the bargaining unit employees at the Hospital.

A. Interchange

The record demonstrates that there is no employee interchange. The Strong West CSTs have no day-to-day contact with bargaining unit employees. No Strong West CSTs perform work at the Hospital and no unit employees work at Strong West.

B. Supervision

The Strong West CSTs do not share day-to-day supervision with bargaining unit employees. Further weighing against accretion is the limited integration of operations. Strong

West Administrator Brian O'Donovan is responsible for staff supervision at Strong West, along with the department managers.¹⁰ Clinical Director Kathaleen Adamczyk oversees the day-to-day supervision of the CSTs at Strong West as manager of the ambulatory surgery center at Strong West. Adamczyk hired the three CSTs currently employed at Strong West. The following department managers are responsible for their respective areas at Strong West: Wendy Ellen Thompson, nursing director, is responsible for the emergency department and Krystoff Neuman, medical/clinical director, is responsible for the surgery center. O'Donovan, Thompson, Neuman and Adamczyk do not supervise any bargaining unit employees nor do they have any responsibilities or duties at the Hospital.

C. Common Control over Labor Relations

There is no common control over labor relations. Strong West has its own human resource personnel, management and operational autonomy, distinct from the Hospital. Amy Marra provides human resource services to Strong West. She does not provide any human resource services to bargaining unit employees represented by the Union. At the Hospital, Amy Defilippo, the manager of labor relations, is responsible for managing the collective-bargaining agreements for unit employees. She has no oversight or authority over employees at Strong West. Additionally, Strong West has its own policies and procedures, distinct from the Hospital.

D. Geographical Proximity

As noted above, Strong West is geographically separate and is located twenty miles away from the Hospital. The geographical separation between the Hospital's unit employees and the Strong West's CSTs, highlights the CSTs' independent identity from the Hospital's bargaining unit employees and supports their exclusion from the Unit.

¹⁰ It appears that O'Donovan reports to Hospital executive Elizabeth Slavinkas, Senior Director for Ambulatory Care at the Medical Center, and Slavinkas reports to Kathy Parrinello, Executive Vice-President and Chief Operating Officer of the Hospital.

E. Collective-bargaining

The parties' collective-bargaining history weighs against accretion. Despite years of collective-bargaining, the offsite ambulatory facilities have historically been excluded from the Unit. The Board will continue to exclude employees that historically have been excluded from the bargaining unit. Plough, Inc., 203 NLRB 818 (1973); SunarHauserman, 273 NLRB 1176 (1984). The Union and Employer have been parties to successive collective-bargaining agreements for decades. The two collective-bargaining agreements negotiated between the parties since the CST position was created in 2009, failed to expressly include or exclude the CST job classification. The Union has not represented the Sawgrass CSTs, or any CSTs since the position was created in 2009. The record demonstrates that the three full-time CSTs at Strong West were never represented by the Union. Specifically, CST Quinton Wilbur previously worked at Sawgrass as a CST before transferring to Strong West and CSTs Lorraine Buzard and Rebecca Burgos were new hires to the Employer. In fact, Buzard and Burgos were previously employed by Lakeside Hospital in the Central Services Department, prior to the Employer's asset purchase of the Strong West facility.

In addition, the after-acquired facilities provision has existed in all of the collective-bargaining agreements since at least 1998. During that time, the Employer established all 25 of its offsite ambulatory facilities to provide outpatient surgical care, including many of the same services provided at Strong West. The parties did not include any employees from the offsite ambulatory facilities in the Unit, except for the employees that were already represented by the Union and permanently transferred from the Hospital campus to the nearby Clinton Crossing location.

Thus, for the reasons stated above, I find that the Strong West CSTs have a distinct and separate community-of-interest from bargaining unit employees at the Hospital and hereby grant the Employer's petition to clarify the Unit to exclude the Strong West CSTs from the Unit.

CONCLUSIONS AND FINDINGS

Based upon the entire record¹¹ in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.
2. The Employer stipulated, and I find, that it is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Union stipulated, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. The Employer and the Union have been parties to a series of collective-bargaining agreements, the most recent of which is effective from September 21, 2014 through September 16, 2017.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. It is hereby ordered that the classification of central service technician (CST) employed at the Employer's Strong West facility is excluded from the Unit of the Employer's employees represented by 1199 SEIU United Healthcare Workers East.

¹¹ The Employer filed a post-hearing brief which has been duly considered. The Union filed a brief that was untimely and requested that the Region accept its untimely filed brief based on "excusable neglect." As the Region issued an Order dated February 2, 2015 clearly designating February 9, 2015 as the deadline for filing briefs, there is no basis to find "excusable neglect" and the Union's brief has not been considered.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington, DC by 5 p.m. EDT March 19, 2015. The request may be filed electronically through the Agency's web site, www.nlr.gov,¹² but may not be filed by facsimile.

Dated at Buffalo, New York this 5th day of March 2015.

/s/Paul J. Murphy

Paul J. Murphy, Acting Regional Director
National Labor Relations Board - Region 3
Niagara Center Building – Suite 630
130 S. Elmwood Avenue
Buffalo, New York 14202

¹² To file the request for review electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlr.gov.